PUBLIC PROSECUTOR v. CHEAH CHENG ENG

[S.C. (Abdul Hamid C.J. (Malaya), Mohamed Azmi & Syed Agil Barakbah S.C.JJ.) November 19, 1985 & January 10, 1986]

[Pulau Pinang – Supreme Court Criminal Appeal No. 4 of 1985]

Criminal Law and Procedure – Charge of trafficking in drugs – Case mentioned in the Sessions Court – Amendment to Dangerous Drugs Act – Application by Public Prosecutor for case to be transferred to High Court – Case transferred to High Court – Application by defence counsel for case to be sent down to Sessions Court for trial – Order made by Judge of High Court – Order set aside on appeal – Dangerous Drugs Act, 1952 ss. 39B & 41A – Criminal Procedure Code (F.M.S. Cap. 6), ss. 417, 418 & 418A – Federal Constitution, art. 145(3).

Constitutional Law – Public Prosecutor – Choice of forum for trial – Federal Constitution, art. 145(3).

In this case the respondent was originally charged for trafficking in dangerous drugs and the case was fixed for hearing before the Sessions Court. In the meantime the Dangerous Drugs Act 1952 was amended to abolish the sentence of life imprisonment for trafficking under section 39B of the Dangerous Drugs Act. The Public Prosecutor thereupon made a requisition under section 41A of the Dangerous Drugs Act 1952 for the case to be tried in the High Court. The case was then transferred to the High Court. Counsel for the respondent made an oral application for the case to be sent down to the Sessions Court and the learned Judge of the High Court made an order accordingly. The Public Prosecutor appealed.

Held: (1) the learned Judge in this case had erred in law in that he had no power to transfer the case from the High Court down to the Sessions Court for trial;

(2) as long as the case was still before a subordinate Court and the trial had not yet commenced the Public Prosecutor by virtue of the power vested in him under section 41A of the Dangerous Drugs Act, 1952, and also under Article 145(3) of the Federal Constitution, may choose the forum for trial;

(3) in this case the Public Prosecutor had made a requisition under section 41A of the Act for the case to be transferred from the Sessions Court to the High Court and therefore the order of the learned Judge must be set aside and the case remitted to the High Court for trial.

Cases referred to:

(1) *Public Prosecutor* v. *Hun Peng Khai* [1984] 2 M.L.J. 318.
(2) *Public Prosecutor* v. *Lim Shui Wang & Ors.* [1979] 1 M.L.J. 65.

SUPREME COURT.

Mohtar Abdullah (Deputy Public Prosecutor) for the appellant.

Karpal Singh (*V. Sithambaram* with him) for the respondent.

Cur. Adv. Vult.

Abdul Hamid C.J. (Malaya) (delivering the Judgment of the Court) : The appeal is by the Public Prosecutor against the decision of Mustapha J. ordering the accused Cheah Cheng Eng (the respondent in this appeal), who is charged under section 39B of the Dangerous Drugs Act 1952 (hereafter called "the said Act") in *Public Prosecutor* v. *Cheah Cheng Eng* (Kedah Criminal Trial No 37 of 1984) be sent down to the Alor Setar Sessions Court for trial.

The charge is for trafficking in 506.4 grammes of cannabis on December 22, 1982 at about 9.30 p.m. at the back of Restaurant Sentosa, Jalan Limbong Kapal, Alor Setar. The accused was arrested on December 22, 1982 and produced before the Magistrate's Court on January 4, 1983. The Prosecuting Officer asked for a postponement pending instructions from the Public Prosecutor. The case was called for mention once a month until November 22, 1983 when the Prosecuting Officer tendered the consent of the Public Prosecutor and asked that the case be transferred to the Sessions Court for trial.

The respondent was produced before the Sessions Court on November 30, 1983. The amended charge was read and explained to him. He claimed trial. The case was fixed for hearing on December 29, 30 and 31, 1984.

In the meantime section 39B(2) of the said Act was amended (Act A553) by the deletion of the words "or imprisonment for life and shall, if he is not sentenced to death, also be liable to whipping" effective from April 14, 1983. By reason of the amendment a question arose whether the Sessions Court had jurisdiction to hear cases falling under section 39B committed prior to the coming into force of the amendment. A ruling was given on April 3, 1984 by the High Court at Kuantan to the effect that section 39B cases pending before the amendment could not be tried at the Sessions Court.

Consequently, this case was transferred to Alor Setar High Court. For the purpose of the transmission to the High Court the Public Prosecutor issued a new consent on May 29, 1984. The Public Prosecutor also issued a requisition under section 41A of the Act for the case to be tried in the High Court. The accused was produced before the High Court on June 17, 1984.

Meanwhile a decision was made in *Public Prosecutor* v. *Hun Peng Khai*[1] to the effect as follows –

"Once the accused persons in this case were charged and their cases fixed for hearing in the Sessions Court before the coming into force of the amending Act that gave them a vested right to trial in that court."

The decision was upheld by the Federal Court. Our view on the effect of this decision will be discussed shortly.

We now turn to the present case. The learned Judge purportedly acted under section 417(1) (e) and (aa) of the Criminal Procedure Code when he ordered the case to be sent down for hearing in the Sessions Court. Section 417(1) (e) and (aa), for convenience, are reproduced hereunder and they read –

"417. (1) Whenever it is made to appear to the High Court –

(e) that such an order is expedient for the ends of justice, or is required by any provision of this Code,

it may order –

(aa) that any offence be inquired into or tried by any Court not empowered under sections 121 to 126 but in other respects competent to inquire into or try such offence."

It is to be noted that section 418(i) Criminal Procedure Code requires every application for the exercise of the power conferred by section 417 Criminal Procedure Code to be made by motion which shall, except when the applicant is the Public Prosecutor, be supported by affidavit. But in the case of the application made before the learned Judge, it was not proceeded by way of motion and it was also not supported by any affidavit.

Notwithstanding section 418(i), it appears that subsection (2) of section 417 Criminal Procedure Code allows the High Court to make an order under sub-section (1) of section 417 Criminal Procedure Code "either on the report of the lower Court, ... *or on its own initiative.*" (the emphasis is ours). But such is not the case here. The Court did not make an order on its own initiative but pursuant to an oral application by the defence counsel in which event there ought to have been a motion supported by an affidavit as required by section 418(i) of the Criminal Procedure Code.

In this connection it is also to be noted that since the learned Judge made an order pursuant to the power conferred by section 417 of the Criminal Procedure Code, such order should be within the confines of the second limb of section 417(1), namely paragraphs (aa) to (ee).

Under paragraphs (aa) to (ee), the High Court in exercise of the power conferred under section 417(1) (a) to (e) may only transfer a case from a subordinate criminal court to another subordinate criminal court or from a subordinate criminal court to itself. In *Public Prosecutor* v. *Lim Shui Wang & Ors.*[2] (Federal Court), Suffian L.P. delivering the Judgment of the Court on this particular point had this to say at page 66, column 2 –

"From subsection (2) of section 417 it is clear that the High Court may transfer a case on the report of the lower court or on the application of the Attorney-General or, as happened here, on its own initiative; but this is subject to two restrictions. First, the High Court may do so only for the reasons stated in paragraphs (a) to (e) of sub-section (1) of section 417, and secondly, the High Court may transfer a case only from a subordinate court to another subordinate court or to itself, but not from itself to a subordinate court."

Viewed in the light of this authority, it is our view that the learned Judge had erred in law in that he had no power to transfer the case from itself down to the Sessions Court for trial.

At this juncture, we return to the judgment of Edgar Joseph Jr. J. in *Public Prosecutor* v. *Hun Peng Khai & Ors. (supra).*

The circumstances surrounding that case were that Hun Peng Khai and others were charged before the Sessions Court for offences under section 39B(1) of the Dangerous Drugs Act, 1952. The Dangerous Drugs (Amendment) Act, 1983 amended the Dangerous Drugs Act, 1952, so that offences under section 39B(1) were made punishable by death and became triable only in the High Court. Prior to the amendment the cases were punishable with imprisonment for life or death and could be tried in appropriate cases in the Sessions Court. As a result this particular case was transmitted to the High Court for trial. Basically the question that arose was "Whether sections 15 and 16 of the Dangerous Drugs (Amendment), Act, 1983 which confer exclusive jurisdiction on the High Court to try offences in contravention of section 39B(1) of the Dangerous Drugs Act, 1952 have the effect of taking away the jurisdiction of the Sessions Court even with regard to cases pending trial before the latter prior to the coming into force of the amending Act?"

The answer to this question is, in our view, in the negative. Cases pending trial prior to the coming into force of the amending Act may still

be heard by the Sessions Court unless of course the Public Prosecutor should choose to invoke section 41A of the Act which empowers the Public Prosecutor to require any case in respect of an offence under the Act to be tried by the High Court. It is of fundamental importance therefore that a distinction be drawn between the present case and *Hun Peng Khai's* case. In *Public Prosecutor* v. *Hun Peng Khai & Ors.*, *supra*, the case was transmitted to the High Court for trial by the Sessions Court President who felt bound by the judgment of Shaik Daud J. in Kuantan Criminal Trials Nos. 1 and 4 of 1984. This was done after the trial had commenced in that Court, *i.e.* after they had each claimed trial and one witness Sergeant Major Mokhtar had already given evidence. In that sense the accused had a vested right to have his case heard in the Sessions Court. In the instant case, however, the trial had not yet commenced and as such it cannot be said that the accused had a vested right to trial in the Sessions Court. We are of the view that so long as the case was still before a subordinate court and the trial had not yet commenced the Public Prosecutor by virtue of the power vested in him under section 41A of the Act and also under Art. 145(3) of the Federal Constitution may choose the forum for trial.

Fundamentally section 41A of the Act creates the further distinction between the present case and *Hun Peng Khai's* case. The case under consideration was transferred from the Sessions Court to the High Court for trial pursuant to a requisition by the Public Prosecutor under section 41A of the Act whereas it was not so in *Hun Peng Khai's* case. For convenience, section 41A(1) is reproduced hereunder and it reads –

"41A. (1) Where any case in respect of an offence under this Act is triable exclusively by the High Court or is *required by the Public Prosecutor to be tried by the High Court*, the accused person shall be produced before the appropriate subordinate court which shall, after the charge has been explained to him, transmit the case to the High Court without holding a preliminary inquiry under Chapter XVII of the Criminal Procedure Code, and cause the accused person to appear or be brought before such Court as soon as may be practicable." (the emphasis is ours).

For reasons we have stated, we allow this appeal. The order of the Judge is set aside and the case is remitted to the High Court for trial.

Appeal allowed.

Solicitors: *Karpal Singh & Co.*

CHIN KOK KWONG CONSTRUCTION SDN. BHD. v. SUNRISE TOWERS SDN. BHD.

[O.C.J. (Edgar Joseph Jr. J.) November 18, 1983 & May 18, 1984]

[Penang – Civil Suit No. 187 of 1982]

Company Law – Winding Up Order – Whether plaintiffs' solicitor can recover debts after appointment of Official Receiver.

Practice and Procedure – Leave to amend Indorsement and Statement of Claim – Principles applicable – R.H.C. 1980, O. 20 r. 5(5).

A Winding Up Order was made against the plaintiff company on November 7, 1977. However, on March 2, 1981, the order was stayed until further order. It was also ordered, *inter alia*, that the Official Receiver or his solicitors do forthwith demand and/or recover by all lawful means all moneys due from all debtors of the company for distribution to the various creditors of the company.

By a Writ of Summons dated April 7, 1982, the plaintiffs claimed against the defendants the sum of $39,300 being deposit paid under a Sale and Purchase Agreement dated October 2, 1975 entered into between the plaintiffs as purchasers and the defendants as vendors, for the purchase of an apartment. The plaintiffs sought to amend the Indorsement of their claim and Statement of Claim by adding a new cause of action against the defendants, namely, the recovery of a sum of $29,936.71 being money allegedly due and payable by the defendants to the plaintiffs under a building contract dated March 16, 1977 for work done by the plaintiffs as contractor and the defendants as employer.

The issues that arose were whether the plaintiffs' solicitor had authority to institute the suit herein and that even if this suit had been properly instituted, whether, on the facts, the plaintiffs could apply for leave to amend under Order 20 rule 5(5), Rules of the High Court, 1980.

Held: (1) a letter by the Official Receiver stating that he had no objection to the plaintiffs' solicitor taking court action against the debtors owing money to the plaintiff company before the Winding Up Order dated November 7, 1977 adding, that in such event, they would be acting, not on behalf of the Official Receiver, but on behalf of the plaintiffs who would be liable as regards all costs and expenses, can in no way abrogate or even modify the order dated March 2, 1981 enabling only the Official Receiver or his solicitors to recover all moneys due from all debtors of the company;

(2) in the circumstances it could not be said that the new cause of action arose out of the same facts or substantially the same facts as the cause of action for the return of the deposit for the purchase of the apartment. To allow such an amendment would turn a suit of one character into a suit of another and inconsistent character;

(3) this suit was instituted without authority and should accordingly be dismissed with costs.

[*Editorial Note* : The plaintiffs' appeal to the Federal Court in F.C.C.A. No. 203 of 1984 has been withdrawn.]